

BEST COPY AVAILABLE

PUBLISHER'S NOTICE

**Material on the following frames is
the best copy available to publisher.**

(7) SEP 4 1945

CHARLES ELMORE GROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND
CONTRACTORS,

Petitioner,
vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.

HORACE C. WILKINSON,
BORDEN BURR,
Counsel for Petitioner.



INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
Statement of matter involved	2
Opinion below	5
This Court has jurisdiction	5
Questions presented	6
Reasons relied on for allowance of writ	7
Specifications of errors to be urged	7
Brief in support of petition	9
Point I. Congress has not foreclosed an investigation of fraud by the Courts	10
Point II. If Board's finding on perjury, vel non, is conclusive petitioner is deprived of due process of law	11

TABLE OF CASES

<i>Chicago R. R. Co. v. Minnesota</i> , 134 U. S. 418	11
<i>Labor Board v. Columbian Co.</i> , 306 U. S. 292	13
<i>Labor Board v. Jones & Laughlin</i> , 301 U. S. 47	11
<i>Mooney v. Holohan</i> , 294 U. S. 103	12
<i>Pyle v. Kansas</i> , 317 U. S. 213	12

TABLE OF STATUTES CITED

United States Code :

Title 28, Section 347	5
Title 29, Section 160(d)	6, 7, 10
Rules of the Supreme Court of the United States,	
Rule 38	5, 6

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

the first time in the history of the world.

19

13
14
15
16

17
18

19

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND
CONTRACTORS, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

Your petitioner, Salmon & Cowin, Inc. Mining Engineers and Contractors, a corporation, organized under the laws of the State of Alabama, respectfully prays that a Writ of Certiorari issue out of this Court to review the final

decree of the U. S. Circuit Court of Appeals for the Fifth Circuit rendered in the cause of Salmon & Cowin, Inc., Mining Engineers and Contractors, a corporation, Petitioner, vs. National Labor Relations Board, Respondent, and National Labor Relations Board, Cross-Petitioner, vs. Salmon & Cowin, Mining Engineers and Contractors Supply Co., a corporation, Cross-Respondents, No. 11138 in said court, on to-wit, the 1st day of June, 1945, whereby said Circuit Court of Appeals overruled petitioner's application for a rehearing of the order, judgment, or decree rendered by said court on the 30th day of April, 1945, wherein said Circuit Court of Appeals ordered, adjudged, and decreed that your petitioner cease and desist from discouraging membership in and interfering with their employees in relation to labor organizations and to reinstate and make whole one J. P. Milam found to have been discriminatorily discharged.

The opinion of the Circuit Court of Appeals is not officially reported but appears at page 80 of the Record. The decree sought to be reviewed appears at page 92 of the Record.

Summary Statement of the Matters Involved

The National Labor Relations Board issued its complaint against petitioner upon amended charges filed on November 12, 1943, by the International Union of Mine, Mill and Smelter Workers, affiliated with the Congress of Industrial Organizations. For convenience, we refer to the National Labor Relations Board as the "Board," the International as the "Union" and the petitioner as "Salmon."

Among other things, the complaint charged that Salmon discharged Milam and refused to reinstate him because of his membership and activities in the Union.

All charges in the complaint were denied by Salmon.

The Board ordered Salmon to cease and desist from discouraging membership in and interfering with their employees in regard to labor organizations and Salmon was

ordered to reinstate and make whole Milam who was found to have been discriminatorily discharged.

Salmon filed a petition in the U. S. Circuit Court of Appeals for the Fifth Circuit in which Salmon charged that the jurisdiction of the Board to pass on the question of whether or not Milam was discharged because of his membership and activity in the Union was fraudulently acquired by the fraudulent concocted claim set forth in the petition to the effect that Salmon discharged Milam and refused and failed to reinstate him because of his membership and activities in the Union.

Salmon claimed in the petition in the Court of Appeals that Milam caused said simulated claim and said statement to be included in the complaint in said cause knowing it was false and that he supported said fraudulent claim by wilfully and corruptly and falsely testifying to the effect that he was discharged by Salmon and had since been refused reinstatement because of his membership and activities in the Union and in that way, procured and obtained the rendition of the part of the decree sought to be reviewed.

Salmon averred in its petition in the Court of Appeals (R. p. 5) that *the only evidence tending to support the fraudulent claim Milam caused to be incorporated in the complaint before the Board was the testimony of Milam himself.* Salmon claims that testimony was perjured from start to finish.

The Board filed a petition for enforcement in full of its order against Salmon. Salmon's position was that it never discouraged membership in labor organizations and never interfered, restrained or coerced its members in any way and therefore it did not object to the cease and desist order and did not seek a review thereof.

Salmon's prime defense is that the jurisdiction of the Board to decide whether or not Milam was discharged for

Union activity was invoked by the fraudulent averment or fraudulent charge that Milam was discharged for unionism and that Milam perjured himself to support the fraudulent charge.

The primary issue before the Board was whether Milam was discharged for Union activity or on account of the fact that Milam, a white man, turned to a group of negro employees who were getting off a skip and said to them, "No checks, no work tomorrow." (Vol. 2 appendix to brief for petitioner, page 232, R. 595.)

Milam admitted telling the men that they should not work Saturday unless they were paid on Friday. Saturday was the regular pay day.

Milam claimed that the statement was made on the skip as the men were going down into the mine and not when they were leaving it.

The significance of a white man telling a group of negroes not to work on Saturday unless they were paid on Friday is that under the circumstances existing, the statement was equivalent to an order to the negroes to cease work and was well calculated to seriously interrupt the work that Salmon was doing in the mine.

The Circuit Court of Appeals agreed with us that if the jurisdiction of the Board to decide the issue was invoked by a fraudulent averment and Milam perjured himself to support the fraudulent charge, Salmon was entitled to relief. But the court said that the Board's finding crediting Milam was conclusive and binding and an insurmountable obstacle in the way of relief. Said the court:

"Salmon's brief, with its 17 categorical charges of false swearing against Milam and its support of these charges by references to the controverting proof, and to the almost complete lack of corroboration of Milam's statements, does go far, in the light of the admitted

fact that Milam did advise the men that they should not work Saturday unless paid Friday, and that this brought on his discharge, to show that Milam's testimony that he was discharged for unionism was unworthy of belief, and the Board ought not to have credited his testimony. But having failed to convince the Board, with whom alone convincing counted, that Milam was a fraud doer and a perjurer, Salmon's efforts to convince have no office here. Under the statute, we must leave questions of credibility to the Board, just as we leave them in jury cases to the jury, we must take the facts as Board and jury have found them. Since this is so, Salmon's very argument that Milam's testimony has covered, though falsely, every material point, defeats its petition for relief, for it affirms that there is positive evidence accredited by the Board on each material point."

Our insistence is that the Board's finding does not prevent the court from considering any relevant evidence when petitioned to grant relief on the ground that the jurisdiction of the Board was fraudulently invoked and the fraudulent charge supported by perjured testimony.

II

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is not officially reported but appears at page 80 of the Record. The decree of the Court appears at page 92 of the Record.

III

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28, Sec. 347 of the United States Code and Rule

38 of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939, amended March 25, 1940, October 21, 1941, and May 26, 1941.

IV

Questions Presented

The questions presented are:

(1) Whether the U. S. Circuit Court of Appeals for the Fifth Circuit is prohibited from examining the record before the National Labor Relations Board in Case #10-C-1413 in the matter of Salmon & Cowin, Inc., Mining Engineers and Contractors, and International Union of Mine, Mill and Smelter Workers for the purpose of ascertaining and declaring whether or not Milam fraudulently invoked the jurisdiction of the Board and perjured himself to support the fraudulent charge that he was discharged for union activity.

(2) Is Salmon deprived of relief against an oppressive order rendered by the Board in a case in which its jurisdiction was fraudulently invoked and the fraudulent charge supported exclusively by perjured testimony.

(3) Does the provision in subparagraph (d) in Title 29, Sec. 160, U. S. C. A., to the effect that:

“The findings of the Board as to the facts, if supported by evidence, shall be conclusive,”

bar the U. S. Circuit Court of Appeals for the Fifth Circuit from examining the record of Milam’s testimony before the Board in connection with other testimony before the Board for the purpose of ascertaining and adjudicating whether or not Milam committed perjury when he testified before the Board.

V.

Reasons Relied On for Allowance of the Writ

(1) The Circuit Court of Appeals for the Fifth Circuit decided an important question of Federal law which has not been but should be settled by this Court.

(2) The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question probably in conflict of applicable decisions of this Court.

(3) U. S. C. A. 29, Sec. 160(d) as construed by the Circuit Court of Appeals for the Fifth Circuit and applied to the facts in this case violates the "due process of law" clause of the Constitution of the United States.

(4) The Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervision.

VI.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Fifth Circuit erred—

(1) In rendering the decree dated June 4, 1945,

(2) In denying Salmon's petition,

(3) In granting the Board's petition, to reinstate and make whole J. P. Milam.

(4) In holding in effect that it could not look to or examine the Board's record for the purpose of ascertaining and adjudicating that the jurisdiction of the Board to decide whether or not Milam was discharged for Union activity was invoked by a fraudulent

averment and that Milam perjured himself to support the fraudulent charge.

(5) In holding in effect, that the determination of the questions of fact which underlie the proposition that the jurisdiction of the Board was fraudulently invoked and that Milam perjured himself to support the fraudulent charge in invoking the Board's jurisdiction is confided exclusively to the Board.

SALMON AND COWIN, INC., MINING
ENGINEERS AND CONTRACTORS, A
CORPORATION,

By HORACE C. WILKINSON,

BORDEN BURR,

Both of Birmingham, Alabama,

Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND
CONTRACTORS, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MAY IT PLEASE THE COURT:

The question sought to be reviewed is a question of law, an error apparent on the face of the opinion of the Circuit Court of Appeals for the Fifth Circuit. As we understand this case, it is wholly unnecessary for the Court to even have recourse to the record of the National Labor Relations Board, filed in the United States Circuit Court of Appeals for the Fifth Circuit. We do not ask this court to undertake to decide whether or not Milam perjured himself when he testified before the Board.

U. S. C. A., Title 29, Section 160(d) declares that

"The findings of the Board as to the facts, if supported by evidence, shall be conclusive."

The only testimony in the Board's record relating to the charge that Milam was discharged because of his union activity is the testimony of Milam himself. We do not understand that that proposition is controverted. We, therefore submit that if Milam's testimony before the Board was perjured, then the findings of the Board were arbitrary and not supported by the evidence.

I

We further submit that Congress has not foreclosed an investigation of fraud by the courts. The finding of the Board that it was not defrauded is not conclusive on the judiciary. We respectfully insist that when relief is asked on the ground that the only evidence before the Board tending to support the charge that Milam was discharged for union activity was perjured evidence, the court must examine any relevant evidence, including the Board's record, in reaching a decision.

It has been said that there is no wrong without a remedy. If Milam caused the jurisdiction of the Board to be fraudulently invoked and undertook to support the fraudulent charge with perjured testimony, Salmon is entitled to relief. The fact that the Board decided that Milam did not perjure himself is of no moment. Whether Milam fraudulently caused the Board's jurisdiction to be invoked and willfully and corruptly swore falsely about a material matter in an effort to support the fraudulent charge is essentially a judicial question which can only be authoritatively decided by a court. When a charge is made in good faith that the Board's jurisdiction was fraudulently invoked and that

Milam undertook to support the fraudulent charge with perjured evidence, we submit that due process requires the final decision of that question by the court.

We think the court will find an analogous proposition in *Chicago R. R. Co. v. Minnesota*, 134 U. S. 418. In that case a state statute made rates recommended and published by a railway commission final and conclusive as to what were equitable and reasonable charges. In striking down the statute the court said:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

II

If a finding of the Board on the question of perjury, *vel non*, is conclusive in this case, why isn't the petitioner deprived of its right to a judicial investigation by due process of law on the question of whether or not perjury was committed *as a basis for judicial relief*.

In *Labor Board v. Jones and Laughlin*, 301 U. S. 47, this court said:

"The board must receive evidence and make findings. The findings as to the facts are to be conclusive, only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced."

It is a vain and useless thing to make the order of the Board subject to review by the United States Circuit Court

of Appeals for the Fifth Circuit if that court is eviscerated of all authority and jurisdiction to determine whether or not Milam testified willfully and corruptly false. To say that a court may review but may not hear or consider evidence of perjury is a denial of due process.

In *Pyle v. Kansas*, 317 U. S. 213, this court ruled that imprisonment resulting from perjured testimony knowingly used by the State authorities to obtain a conviction was a deprivation of rights guaranteed by the Federal Constitution and if proven would entitle a prisoner to release from custody. It might well have been argued that the Kansas court that tried the prisoner in that case decided that perjured testimony was not knowingly used by the State when it overruled the prisoner's motion for a new trial and sentenced him to life imprisonment and that its decision was conclusive. This court apparently declined to accept a suggestion of that kind.

Mooney v. Holohan, 294 U. S. 103.

We submit that it does not matter how the Circuit Court of Appeals for the Fifth Circuit is convinced that Milam perjured himself; whether by his testimony, the testimony of others, a subsequent investigation or otherwise. The important thing is, does the showing made convince the court that he was a fraud doer and a perjurer?

The opinion written by the United States Circuit Court of Appeals for the Fifth Circuit clearly intimates that the court was of the opinion that Milam's testimony that he was discharged because of unionism was unworthy of belief. The court, however, took the position that having failed to convince the Board "with whom alone convincing counted, that Milam was a fraud doer and a perjurer, Salmon's efforts to convince have no office here."

We respectfully submit that was a complete abdication of the judicial function.

We do not believe that Congress intended to prevent the United States Circuit Court of Appeals ascertaining and declaring that Milam's testimony before the National Labor Relations Board in support of a charge that Milam was discharged for unionism, was perjured testimony. If it did, then Congress violated the due process of law clause of the Constitution of the United States.

If the courts of the country have jurisdiction and authority to grant a litigant relief on the ground that the decree against him was obtained by fraudulent invocation of jurisdiction and perjured testimony to support the charge, then the exercise of the judicial function to find out the truth cannot be prevented by a finding of an administrative body. An administrative finding is not a judicial decision. A court empowered to examine a record for the purpose of ascertaining whether or not a finding is supported by substantial evidence (*Labor Board v. Columbian Co.*, 306 U. S. 292) must have the authority to decide whether or not the testimony was perjured in order to decide whether the evidence is substantial. Perjured testimony is not substantial testimony.

Respectfully submitted,

HORACE C. WILKINSON,
BORDEN BURR,

Attorneys for Petitioner.